IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURY I. DIGGS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY TO BRIEF OF SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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MAURY I. DIGGS, *Plaintiff in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2404.

REPLY TO BRIEF OF SPECIAL ASSISTANT TO THE ATTORNEY GENERAL.

When this case was called for argument, Mr. Roche stated that he did not have his brief prepared, and asked time to file it later. This was granted, and the plaintiff in error, called throughout the defendant, was allowed to reply, if he desired that privilege. The oral argument was limited in its scope, but the brief filed by Mr. Roche covers a wide field. We, therefore, submit the following reply:

I.

Forty-four pages of Mr. Roche's brief are devoted to facts antedating the Reno trip, enlarged on for the purpose of showing moral depravity on the part of the defendant. But, taking the testimony quoted by Mr. Roche, without referring to other parts of the transcript, it shows:

1. That the relations between the prosecuting witness and defendant Maury Diggs had commenced long before the Reno trip was ever thought of.

2. That both parties were guilty of culpable conduct.

3. That such conduct could have been prosecuted under the state laws.

4. That the so-called Reno trip was but a continuation of such conduct.

5. That to constitute the trip to Reno a crime, it was necessary that it should have been taken for the *purpose* stated in the indictment, or at least for a *purpose* denounced by the Mann Act. The *purpose* is the gist of the offense. The evidence quoted by Mr. Roche shows that such was not the purpose of the trip.

6. It was proven by the defendant that he had been *told* that he and the girls were about to be arrested, and he believed it to be true. The witnesses who told him this were produced and so testified. The prosecution attempted to prove that no warrant had been issued for his arrest. This was true, but did not affect the fact that he had been *told* that such a warrant was to be issued.

7. The plaintiff had also been *told* by one of the girls that a reporter on a local paper was about to publish an account of their escapades. Lola Norris said she had been so informed by Marsha Warrington. The prosecution attempted to contradict this, not by showing that he was not so *told,* but that such a tale was not, in fact, to be published. This was not a contradiction of the fact that the defendant had been *so informed.*

8. The father of Maury Diggs was about to have him arrested. This is uncontradicted.

9. All the testimony quoted by Mr. Roche shows conclusively that the *purpose* of the trip to Reno was to escape notoriety and arrest.

Such testimony, measured by its legal effect, while it may show moral delinquency, does not

show the commission of the crime charged in the indictment. But a jury, who cannot differentiate between what constitutes a state offense and a federal offense, are apt to think that a defendant should be convicted on general principles, and this we contend was what was done in the court below. The defendant was not placed on trial for moral delinquency, but for a specific offense.

II.

We contend that the instruction of Judge Van Fleet, on the question of defendant's failing to testify to certain facts, could be used against him, as a matter of law, was erroneous. We contend that it placed an undue burden on the defendant. We maintain that it was misleading. This instruction, or one of similar import, is condemned in

> Balliet v. United States, 129 Fed. 689, 696.

IN NO CASE HAS SUCH AN INSTRUCTION BEEN UPHELD.

Conceding that *counsel in his argument* may comment upon the matter without error, this is quite a different thing from the court *instructing the jury,* as a matter of law. Many courts hold that even counsel cannot comment upon it at all. No court holds that the judge can give an instruction, such as was given in this case.

Speaking of the Balliet case, Mr. Roche says (Page 88):

> "If it asserts the doctrine claimed by counsel and is the leading case on the subject, it is somewhat remarkable that it has

> never been, at any time, cited by any federal court as sustaining the doctrine here contended for by plaintiffs in error."

In reply, we may say that this case has never been repudiated by any court, and that probably the Diggs and Caminetti cases and the Balliet case are the *only cases* in which such an instruction has been given. Mr. Roche, in his elaborate brief, presents, and we assume, in view of his great industry and research, has been able to find, no case in which such an instruction has been upheld. The best that he can do is to present cases in which counsel in argument have been allowed to comment. Counsel may be mistaken, and the jury may disregard everything that he says, but, in a jury trial, the jury *must* take the law as the court gives it to them, and if the court gives them that which is not the law on a material point to a defendant's disadvantage, the defendant has not had that legal trial to which he was entitled.

The trial court in the case at bar went much too far when it told the jury that:

> *"It is a legitimate inference that could he have truthfully denied or explained the incriminating evidence against him he would have done so."*

IT IS MOST SIGNIFICANT THAT THE TRIAL JUDGE, IN HIS SUBSEQUENT CHARGE TO THE JURY IN THE CASE OF F. DREW CAMINETTI (now also pending in this Appellate Tribunal), ELIMINATED THE WORDS: "IT IS A LEGITIMATE INFERENCE THAT COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM HE WOULD HAVE DONE SO." (See this fully explained on page 85 of the Opening Brief in this Court in the case of Caminetti v. United States, No. 2405; compare also language of both charges as contained in the respective transcripts of record; in the Diggs case at pages 390-391 of the transcript of record, and in the Caminetti case at pages 439-440, 445, of the transcript of record.)

THIS, OF ITSELF, INDICATES MOST STRONGLY THAT THE LEARNED JUDGE OF THE COURT BELOW, IN INSTRUCTING THE JURY IN THE SUBSEQUENT CAMINETTI TRIAL, CONSIDERED THAT HE HAD GONE ENTIRELY TOO FAR IN CHARGING THE JURY AS HE DID IN THE DIGGS TRIAL, AND, FOR THAT REASON, ELIMINATED FROM HIS SUBSE-

QUENT CHARGE IN THE CAMINETTI CASE, THE LANGUAGE: "IT IS A LEGITIMATE INFERENCE THAT COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM HE WOULD HAVE DONE SO." OTHERWISE, THE INSTRUCTIONS TO BOTH JURIES IN THE DIGGS AND CAMINETTI CASES, ON THIS PARTICULAR SUBJECT, ARE EXACTLY THE SAME. WE RESPECTFULLY SUBMIT THAT THE ELIMINATION, BY THE TRIAL JUDGE, OF THE ABOVE QUOTED LANGUAGE CAN BE EXPLAINED ON NO OTHER THEORY BUT THAT HE CONSIDERED THAT HE HAD SUBSTANTIALLY ERRED IN HIS INSTRUCTIONS IN THE DIGGS CASE AND THAT HE SOUGHT TO AVOID A REPETITION OF THE SAME ERROR IN THE CAMINETTI CASE BY ELIMINATING THE LANGUAGE ABOVE QUOTED. HOWEVER, WE SUBMIT THAT EVEN THE INSTRUCTION IN THE CAMINETTI CASE, MODIFIED AS IT WAS, IS EQUALLY ERRONEOUS AND CONSTITUTES REVERSIBLE ERROR.

It is not necessary to repeat the language of the court of appeals in the eighth circuit showing why such an instruction is erroneous, misleading and prejudicial.

We do not concede, as a proposition of law, or of logic, or of reason, or of sense, or of fact, that "it is a legitimate," or any just, or reasonable, "inference" that because a defendant does not deny or explain *all* the incriminating evidence against him it is for the reason that he cannot truthfully deny or explain. Our common knowledge and experience in human affairs teaches us that many things, at times, cannot be explained or denied, or at least satisfactorily explained or denied. Defendants are often the victims of circumstances and are placed in such positions that they are unable to explain many matters.

The instruction in the case at bar, as in the Balliet case, certainly went entirely too far. We can perceive no real distinction between telling the jury, as was done in the Balliet case, that: "You may consider in determining the question, the fact that the defendant having gone upon the witness stand, *if he has not fully explained, or has not explained matters which are material to the issues in this case and which are naturally within his knowledge, you may*

consider that as a circumstance tending to show that the facts if explained would bear out the contention of the Government, and his failure to give them or to give a truthful explanation is against him," and telling the jury, as was done in the case at bar, *"if he (defendant) has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; SINCE IT IS A LEGITIMATE INFERENCE THAT, COULD HE HAVE TRUTHFULLY DENIED OR EXPLAINED THE INCRIMINATING EVIDENCE AGAINST HIM, HE WOULD HAVE DONE SO."* Placed side by side, both instructions amount to substantially the same thing. They are unfavorable and prejudicial to a defendant. They place him in a most unfavorable and prejudicial attitude before the jury. They indicate a hostile attitude on the part of the trial Judge. They place an undue burden upon a defendant, requiring him to explain or deny *everything* of an incriminating nature. They are misleading. The jury is not informed what acts of an

incriminating nature the defendant must explain or deny.

As was well said by the Supreme Court of the United States, in the case of Hicks v. United States, 150 U. S. 442; 37 L. Ed. 1137, 1138, *1141:* "Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, *to whose lightest word the jury, properly enough, give a great weight,* should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a *competent* witness.' THE POLICY OF THIS ENACTMENT SHOULD NOT BE DEFEATED BY HOSTILE COMMENTS OF THE TRIAL JUDGE, WHOSE DUTY IT IS TO GIVE REASONABLE EFFECT AND FORCE TO THE LAW."

The instructions of the trial court, in the case just cited, were not nearly as prejudicial as the instructions in the Balliet case and in the case at bar, and yet the Supreme Court

declared that: "The policy of this enactment *should not be defeated by hostile comments of the trial Judge, whose duty it is to give reasonable effect and force to the law.*"

We have made a most painstaking examination of every authority and statement of a text-writer referred to by the able counsel for the Government in their brief. In maintaining their contention, that "the accused having voluntarily taken the witness stand waived *all* immunity" (see subdv. IV, pp. 73-90), it will be noted that counsel for the Government constantly confuses and confounds the failure or refusal of a defendant to *answer proper* and *material questions actually put to him on cross examination* with a radically different situation existing in the case at bar where it appears that the defendant *never refused to answer any proper or material questions.*

We respectfully submit, as too plain for argument, that it is one thing, in the law, for a defendant to fail or refuse to answer proper and material questions, and that such failure or refusal to answer proper and material questions may be commented upon by the prosecuting attorney in his argument to the jury; and that it is quite another and different thing to permit the prosecuting officer to comment

upon the fact that the defendant did not explain or deny certain matters when the prosecuting attorney either could not lawfully, on cross examination, or did not see fit to, ask the defendant to explain or deny the matters referred to by him in his argument to the jury.

We concede that, if the defendant in the case at bar, on being cross examined by the prosecuting attorney, had either failed or flatly refused to answer proper and material questions, actually put to him, his conduct in that connection and his failure or refusal could be commented upon by the prosecuting attorney.

BUT THAT IS NOT THE CASE AT BAR. THE DEFENDANT DIGGS NEVER REFUSED OR FAILED TO ANSWER ANY PROPER OR MATERIAL QUESTIONS.

SUCH BEING THE FACTS, HOW CAN THE SEVERAL AUTHORITIES AND PASSAGES FROM TEXT-BOOKS RELATING TO THE FAILURE OR REFUSAL OF A DEFENDANT "TO ANSWER PROPER AND MATERIAL QUESTIONS" BE DEEMED APPLICABLE?

Briefly, we refer to the authorities and statements of the law, cited by counsel for the Government, to show their utter inapplicability to the case at bar.

On pages 89-90, of the Government Brief, counsel calls attention to the case of Fitzpatrick v. United States, 178 U. S. 304, 316; 4 L. Ed. 1083. That was a case involving the question solely of the *proper limits* of the cross examination to which a defendant subjects himself when he takes the stand. This is not the situation in the case at bar. In our Opening Brief, pages 33-35, we referred, at considerable length, to the leading case of Fitzpatrick v. United States, supra, and showed unquestionably that that case only involved the point, as to the proper limits of the cross examination to which a defendant subjects himself when he takes the stand.

On pages 90-92 of the Government Brief, reference is made to the case of State v. Ober, 52 N. H. 459; 13 Am. Rep. 88-91. That case is absolutely inapplicable and relates to a refusal of a defendant, in that case, "to submit to a full cross examination, within proper limits." That is not this case. The defendant Diggs never refused to submit to a full cross examination within proper limits.

On page 90 of the Government Brief, reference is made to a note in the third edition of Judge Cooley's work on Constitutional Limitations, referring to the Ober case. Of course, the observations of Judge Cooley, in citing the Ober case, related to "the right of comment where the party makes himself his own witness and *then refuses to answer proper questions,*" a radically different situation from that existing in the case at bar.

On pages 91-92 of the Government Brief, reference is made to the case of State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688, where after a review of the authorities on the subject it was held in that case, as shown by the syllabus, that (2) the defendant "could not refuse to answer questions put on cross examination to discredit his direct evidence, on the ground that answering would incriminate himself." This mere statement shows its utter inapplicability to the case at bar.

On page 92 of the Government Brief, counsel refers to 12 CYC, pp. 576-7, as stating the rule on the subject. But "the rule on the subject" will be found to relate to the proposition that: "The prosecuting attorney then has the same rights to attack his (defendant's) credibility in argument or to comment upon his testimony

OR UPON HIS FAILURE OR REFUSAL TO ANSWER PROPER AND MATERIAL QUESTIONS WITHIN HIS KNOWLEDGE AS IN THE CASE OF ANY OTHER WITNESS." That is not this case. The defendant Diggs never refused to answer any proper or material questions on cross-examination. Had counsel for the Government read a little further in CYC., Vol. 12, on the next page, pp. 577-578, he would have found the rule applicable to the situation in the case at bar stated as follows:

> "In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross examination as to matters not touched upon in direct examination.*"

In the Federal courts and in the courts of the State of California, the right of cross examination is restricted to matters inquired of in chief.

12 CYC., 577, 578;

People v. McGungill, 41 Cal. 429;

People v. Saunders, 114 Cal. 216;

State v. Elmer, 115 Mo. 401; 22 S. W. 369;

State v. Fairlamb, 121 Mo. 137;

State v. Baldsoer, 88 Iowa 55;

Balliet v. United States, 129 Fed. 689;
United States v. Mullaney, 32 Fed. 370;
Sec. 13, Art. 1, Const. of Cal.;
Sec. 1332, Cal. Penal Code.

In the case of United States v. Mullaney, just cited, Mr. Justice Brewer said:

> "Of course, cross examination is, in the Federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony."

The case of People v. Mead, 145 Cal. 500, cited on page 92 of the Government Brief, is not applicable at all because, in that case it appeared "that the defendant had testified EQUIVOCALLY on that subject and denied the marriage, if at all, only by implication." It was held that the prosecuting attorney had the right to comment upon the EQUIVOCAL manner in which he testified and denied the marriage. That is not this case.

The same may be said of another California case cited by counsel for the Government on page 92 of his Brief, the case of People v. Wong Bin, 139 Cal. 65-66. In that case, the defendant took the stand and "went *fully* into the details of the difficulty, claiming that the

killing was in self defense." Having gone *fully* into the subject, it was held that "under these circumstances the District Attorney was authorized in commenting upon his failure to deny certain alleged statements testified to by other witnesses to have been made by him, *inconsistent with his testimony given on the trial.*" The Supreme Court of California immediately qualified this language by adding: "The question thus presented is VERY DIFFERENT from the case where the defendant is not a witness at all, OR A WITNESS ONLY AS TO SOME FORMAL MATTER."

The case of Powers v. United States, 223 U. S. 303-316; 56 L. Ed. 448, cited on page 93 of the Government Brief, is also utterly inapplicable to the situation in the case at bar. That case, like the Fitzpatrick case, involved the question as to the proper limits of the cross examination of the defendant. That is not the case at bar. No question as to the proper limits of any cross examination of the defendant Diggs arises in this connection.

The case of Sawyer v. United States, 202 U. S. 150-168; 50 L. Ed. 979, cited on page 93 of the Government Brief, is also utterly inapplicable to the situation in the case at bar.

The question involved in that case was as to the proper limits of the cross examination of the defendant. The Supreme Court, through Mr. Justice Peckham, held: "It has been held in this Court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution *has the right to cross examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime.*" (Citing Fitzpatrick v. United States, 178 U. S. 304; 44 L. Ed. 1078, 20 Sup. St. Rep. 944.) No such proposition is involved in the case at bar.

The case of Cotton v. State, decided by the Supreme Court of Alabama, 6 South. 372, cited on page 93 of the Government Brief, is also, upon the facts, utterly inapplicable to the case at bar. There, it appeared that: "Defendant was sworn and examined on his own request, and REFUSED TO DENY that he took the steer, or that he sold it to one Beasley." In his argument to the jury, the prosecuting attorney was held justified in commenting on the refusal of the defendant to deny as above stated. Such a state of facts does not exist in the case at bar.

We are unable to find a case of Graves v. State, claimed, by counsel for the Government, on page 94 of their Brief, to be reported in 7 South. 317, but if it is anything like the case of Cotton v. State, supra, it is self-evident that it is inapplicable to the case at bar.

The case of State v. Harrington, 12 Nev. 129, relied upon by counsel for the Government on page 93 of their Brief, is also inapplicable as to the facts, and furthermore, what is there said is clearly obiter dictum.

In that case, it appeared that: "Counsel for defendant, in his argument before the jury, which preceded that of the district attorney, claimed and argued that the statements of witness Merrow were false. The district attorney in his reply, *without objection on the part of counsel for defendant or the court,* stated to the jury 'that, inasmuch as the defendant, when testifying in his own behalf, had not contradicted the statement of Merrow, they must take said statement as absolutely true, that therefore it was true.' "

The case was reversed. The Supreme Court, in its opinion, approved of one of the very authorities cited by us in support of the point we make that error was committed by the trial

court. That authority is People v. McGungill, cited by us on pages 28, 52 of our Opening Brief. The Supreme Court of Nevada, in approving of the law as declared in the case of People v. McGungill, said:

> "In the second case, (People v. McGungill) the defendant offered himself as a witness in his own behalf, and was only asked if he had had certain conversation with one Yates, testified to by said Yates, and he answered that he had not. *He was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court.* Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. *If the court had compelled defendant to answer beyond the line of legitimate cross examination, its action would have been error in a double sense; first, in allowing counsel to press in cross examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary*

witness under established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt."

It need not be stated that the facts of the two cases cited and the one in hand are so widely different that the former are no authority for appellant in this case.

In addition to the foregoing, it is proper to remark that it is apparent to our minds, from the bill of exceptions, that the comments of the district attorney complained of were called by those of the defendant's counsel in declaring the testimony of the witness Merrow to be false. In reply, the district attorney, to sustain the witness, and to show the truthfulness of his testimony, stated that the defendant, although he had an opportunity to do so, had not contradicted the witness. The comments, under the circumstances, were proper."

By approving of the law as declared in the case of People v. McGungill, the Supreme Court of Nevada really supports the position we maintain in the case at bar.

In fact, the language of the Supreme Court of Nevada, in the case of State v. Harrington, can readily be paraphrased so as to apply to the facts of the case at bar as follows:

"He (defendant) *was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court. Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross examination, its action would have been error in a double sense; first, in allowing counsel to press in cross examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under the established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt."*

The case of State v. Grubb, 99 S. W. 1083, referred to on pages 101-103 of the Government Brief, "does not, in terms, repudiate or reverse the earlier Missouri decisions," as is

conceded by counsel for the Government on page 103 of the Government Brief. The case involved the theft of certain cattle and the possession of them and the district attorney had adverted to the failure of the defendant charged with larceny to explain the possession of stolen property recently after it had been stolen. As was well said by the Supreme Court of Missouri in that case, the law "was never intended to prohibit, nor did it have the effect of prohibiting, a court having criminal jurisdiction from instructing a jury as to *the presumption arising from the recent possession of stolen property,* nor to deprive counsel for the State of arguing the effect of the failure by defendants charged with larceny *to explain the possession of stolen property recently after it had been stolen.*"

Obviously, the facts of that case and the law involved are entirely different from those involved in the case at bar.

Counsel for the Government claims that recent decisions by the Supreme Court of Missouri have reversed or repudiated the earlier Missouri decisions. An examination of these decisions will show that, as to the facts involved, they are utterly inapplicable to the legal situation in the case at bar and now pre-

sented to this Appellate tribunal because of the instructions of the trial court. They involved comments of prosecuting officers and not instructions such as are presented for consideration in the case at bar.

In the case of State v. Raftery, 158 S. W. 585, 587, referred to on page 103 of the Government Brief, it affirmatively appears that the trial Court instructed the prosecuting attorney "not to comment on any portion of the case that he (defendant) did not testify about. I will ask the jury to disregard that statement." It was held, on appeal, that the rights of the defendant in that case had been fully protected by the instructions of the trial Judge to disregard the uncalled for comments of the prosecuting officer.

In the case at bar, the trial Judge not only refused to check or reprove counsel for the Government in their comments upon the failure of the defendant to explain that or this or some other matter, which they deemed of an incriminating nature, but the trial Court, on more than one occasion, stated in the presence of the jury that he would instruct the jury in accordance with the arguments of counsel for the Government.

The next case referred to by counsel for the Government in their Brief, on pages 103-109, is that of State v. Larkin, 157 S. W. 600-4. That case involved comments made by the prosecuting attorney in his argument to the jury. It certainly did not involve an instruction, such as is presented in the case at bar. It was held that the trial Court had fully protected the rights of the defendant in that case in stating: "The court has said to stay within the record and *that should not be commented on.*" The Supreme Court of Missouri, after an elaborate examination of the statutes of that State applicable to the rights of a defendant as a witness in his own behalf and a review of a number of authorities relating to the rights of prosecuting attorneys to comment upon the testimony given by defendant, concluded: "That the point made by the defendant touching the comment of the prosecuting attorney, so far as the objection thereto was applicable to the facts, was *allowable.*" (See page 607.) The court also stated, on page 604:

> "Leaving for a moment the broad and ever recurring question of the right of prosecuting attorneys to comment upon the failure of a defendant who takes the stand, to testify to facts within his knowledge, or to facts and statements attributed to him, we might say in passing that upon

> the record and outside of this question *there is no warrant in the testimony for the statement of the prosecuting attorney.* * * * *In our view the chief vice in the utterance of the prosecuting attorney in this behalf arose from the fact that he was not correctly quoting what the record showed.*"

The case was reversed on this and other grounds and sent back for a new trial. In view of what the Supreme Court of Missouri stated, as to the comments of the prosecuting attorney, we submit that much of its opinion is obiter dictum. Certainly the situation in that case is radically different from the one presented by the record in the case at bar. That case involved simply comments of the prosecuting officer, which the record showed were not justified, and the trial Court fully protected the rights of the defendant by instructing the prosecuting attorney: "to stay within the record and *that should not be commented on.*" (See page 603.)

But, in the course of its opinion, the Supreme Court of Missouri concedes that the rule in the State of California is entirely different. As we have seen, the rule in the State of California is the same as that which exists in the Federal Courts. In other words, "cross examination is, in the Federal courts, limited

to the matter of the direct examination, and cannot extend beyond the facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony." (Language of Mr. Justice Brewer in United States v. Mullaney, 32 Fed. 370. See authorities set forth on pages 28-30 of our Opening Brief and repeated on pages 16-17 of this Reply Brief.)

The rule is well settled and is thus summarized in CYC, Vol. 12, pp. 577-578:

> "In those states where the accused is subject to cross examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*"

See, also,

Cooley Const. Lim., (6th ed.) 384-386;
State v. Lurch, 12 Oregon, 99;
State v. Graves, 95 Mo. 510;
People v. O'Brien, 66 Cal. 602;
Gale v. People, 26 Mich. 157;
Fitzpatrick v. U. S., 178 U. S. 304;
Balliet v. United States, 129 Fed. Rep. 689.

As to his examination and cross-examination, the defendant stood as any other witness in the case, but he was still within the protection of the Constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to comment or instruct where the prosecutor could not inquire, and the jury should not have been directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The fact, therefore, that defendant Diggs went upon the stand and testified did not justify the instructions complained of.

All of the authorities referred to in the case of State v. Larkin, supra, and also referred to by counsel for the Government in their Brief on pages 104-105, and also a few other cases, referred to on pages 97-99, involved, with perhaps one or two exceptions, the propriety of comments made by prosecuting attorneys in their arguments to the jury and the ever-recurring question whether the comments, under the particular and peculiar circumstances of each case, were justifiable. IN NOT ONE OF THOSE CASES WAS THE QUESTION PRESENTED OF INSTRUCTIONS TO A JURY SUCH AS ARE INVOLVED IN THE CASE AT BAR. NOT ONE OF THOSE DECISIONS OR AUTHORITIES

UPHOLDS INSTRUCTIONS SIMILAR TO THE ONES PRESENTED FOR CONSIDERATION TO THIS APPELLATE TRIBUNAL IN THE CASE AT BAR. COUNSEL FOR THE GOVERNMENT ARE UNABLE TO CITE TO THIS HONORABLE COURT ONE SINGLE AUTHORITY UPHOLDING THE INSTRUCTIONS GIVEN BY JUDGE VAN FLEET IN THE CASE AT BAR. THE CIRCUIT COURT OF APPEALS, IN THE BALLIET CASE, SEVERELY CRITICIZED AND HELD TO BE REVERSIBLE ERROR AN INSTRUCTION VERY SIMILAR TO THE ONE PRESENTED FOR CONSIDERATION IN THE CASE AT BAR. THE REASONING, THE LOGIC, OF THE OPINION RENDERED IN THE BALLIET CASE APPLIES, WITH PECULIAR FORCE, TO INSTRUCTIONS SUCH AS WERE GIVEN IN THE CASE AT BAR. THE RATIONALE OF THE OPINION IN THE BALLIET CASE SHOWS CLEARLY AND CONVINCINGLY THAT SUCH INSTRUCTIONS AS WERE GIVEN IN THE CASE AT BAR ARE ERRONEOUS, MISLEADING, AND INDICATE A HOSTILE ATTITUDE ON THE PART OF THE TRIAL JUDGE.

In closing our argument on this most important branch of the case, we put this question to this Honorable Court, paraphrasing the apposite language used by the Circuit Court of Appeals in the Balliet case (129 Fed. Rep. 689, *696*): "Are you able to say with certainty, as you must be to uphold the verdict, that the defendant was not prejudiced by the instruction?"

III.

On the point that the Court erred in not instructing the jury that the young women were accomplices, Mr. Roche quotes the evidence given for the Government to show that they were not accomplices, but he ignores the evidence introduced by the defendant showing that they counseled and aided the defendant. The act in which they took part was a crime—punishable by the State law, and the young women were at liberty, on bail, at the time on an accusation charging them with an offense. The law as to accomplices is based upon the theory that when two persons are implicated in an act, or a series of acts, for which both may be punished in some tribunal, and one attempts to throw all the blame upon the other, the jury should be told to view with suspicion the testimony of the person seeking to shield himself and incriminate the other. It is immaterial whether the young women could be punished under the Mann law, or under the State law. They could be punished and had been arrested for the same acts for which the defendant was being tried, and at the time of the trial in the court below the cases against them were pending in the State court. They had been arrested and held as principals equally with the defendants Diggs and Caminetti.

IV.

As to the blood-stained sheet, the counsel does not show how it is material to any issue in the case. It gives him an opportunity, as it gave him an opportunity during the trial, to indulge in condemnation of the defendant, when it proves and tends to prove nothing. It is difficult for this Court to conceive of the highly sensational manner in which this bloody sheet was carried in a triumphal procession from the safe of the United States Attorney to the court-room, exhibited in all its silent appeal to the jury for vengeance of a crime never committed, or attempted, or dreamt of, and the effect that this absolutely immaterial evidence had upon the minds of the jury and spectators.

When we remember that the evidence was not confined to the limited issue tendered by the indictment, but it was sought to show that the defendant was a moral monster, who ought to be crucified, and when it was sought to inflame the jury to such a degree that they should lose sight of the issue which they were to try, and so that they would be compelled by the pressure of public opinion assiduously manu-

factured to bring in a verdict of guilty without calmly considering the evidence on the issue they were trying, we can easily see how this evidence prejudiced the defendant. Mr. Roche does not explain why it was introduced, but tries to gloss it over as of no consequence. It was of great consequence in inculcating in the minds of the jury the belief that defendant should be punished on general principles.

ADDENDUM.

After this Reply Brief had been printed, we discovered the opinion of the Circuit Court of Appeals, on *rehearing,* in the case of Johnson v. U. S., published in 215 Fed. 684, *685.* As it contains some remarks apposite to the case at bar upon the subject of misconduct of the prosecuting attorney as to the "blood stained sheet," we beg leave to refer to the same.

ADDENDUM.

The Circuit Court of Appeals, in the case of Johnson v. U. S. 215 Fed. 684, *685,* when considering the case on *rehearing,* said, of a situation and act of misconduct on the part of the prosecuting attorney similar to that which took place as to the "blood-stained sheet" in the case at bar:

> "In his opening statement the government's attorney said:
>
> 'Another immoral purpose is one too obscene to mention, the purpose being for defendant to compel these women to commit the crime against nature upon his body. We will demonstrate that beyond any reasonable doubt to you, gentlemen, before the close of this case.'
>
> We must assume that the government's attorney, when he made the statement, believed he could produce the evidence. But at some time before he closed he knew that the picture he had drawn of the negro pugilist could not be verified. Yet not until after defendant's attorney had made a motion to that effect after the close of the government's case were the crime against nature counts withdrawn from the consideration of the jury. *A desire, if not a duty, to be fair should have led the government's attorney to withdraw that heinous charge the MOMENT he knew it could not be substantiated."*

In the case at bar, it is not so much what the government's attorney said, as what he did. His act, in exhibiting the "blood-stained

sheet" to the jury and permitting the impression insidiously to creep into their minds that the sheet exhibited mute but horrible evidence of the violation of the virginity of the Norris girl by Caminetti, spoke more forcibly and prejudicially than words.

Even the learned trial Judge became imbued with the same horrible idea, for when the testimony was brought out by Mr. Roche that the sheet was soiled, he said: "The Court: When you say 'soiled' do you mean soiled with blood? A. Yes sir." (Transcript of Record, pp. 207-208. See also testimony fully set forth on pages 120-121 of our Opening Brief.)

It would be an insult to the intelligence and ability of the Government attorneys to assume that they had not fully interrogated Lola Norris before she ever went on the witness stand and knew, just as she testified, that the "blood-stained sheet" was not the mute and horrible evidence of any violation of her virginity but was just as she testified: "I first learned that I had become sick that night, when I arose in the morning. I took the night gown into the front room and told Miss Warrington to put it into the valise. She said it would be better to leave it there. That night gown was finally left in the front bedroom. I returned to the

rear bedroom that morning to complete putting on my wearing apparel. *I put one of the sheets into the closet. There was some discoloration."* (Transcript of Record, p. 276. See also testimony fully set forth on pages 132-133 of our Opening Brief.)

The conduct of the Government attorney was not only most reprehensible but it was most cruel and inexcusable. As we have stated, if he knew anything about his case at all, he must have known the true state of facts relative to the "blood-stained sheet." If he did not know the true state of facts relative to the blood-stained sheet, he, as a public prosecutor, SHOULD HAVE KNOWN THE TRUE STATE OF FACTS. At any rate, the moment Lola Norris testified as to the "blood-stained sheet," he then knew of his terrible mistake and it should have been *his desire, if not alone his duty,* to withdraw or explain this heinous piece of evidence, *"the moment he knew it could not be substantiated."* The language above quoted of the Circuit Court of Appeals in the Johnson case might well be paraphrased, to apply to the case at bar, as follows:

"We must assume that the Government's attorney, when he introduced the 'blood-

stained sheet,' believed it to be evidence of the violation of the virginity of Lola Norris. But at some time before he closed he knew that the picture he had drawn of the 'blood-stained sheet' could not be verified. Yet not until after the defendant had closed his case, in fact, after both prosecution and defendant had closed their case, was the 'blood-stained sheet' explained to the jury. *A desire, if not a duty, to be fair should have led the Government's attorney to withdraw or explain that heinous piece of evidence the MOMENT he knew it could not be substantiated.''*

In the case at bar, the Government attorney did not withdraw or explain the heinous piece of evidence the MOMENT he heard the testimony of Lola Norris, nor did he withdraw or explain it before he closed the case for the prosecution. He made no attempt whatever to do anything to correct the horrible impression that jury and trial Judge and the attorneys for the defense all had received as to the purpose of offering in evidence the ''blood-stained sheet'' until the defense had rested and the evidence was all in and the case was about to go to the jury for argument.

Furthermore, as we have already seen, the ''blood-stained sheet'' was something that had

to do between Lola Norris and Caminetti, and the evidence shows that the defendant Diggs had nothing whatsoever to do with it, and yet it was permitted, over objection and exception, to be introduced in evidence in a prosecution against the defendant Diggs, and the horrible impression was permitted by the Government attorneys to creep into the minds of the trial Judge and jury that the "blood-stained sheet" was the silent but heinous evidence of the violation of a chaste young woman. Obviously, the object of the offering of such evidence was simply to inflame the minds of the jury. At all events, it was error and misconduct of the grossest character, and we respectfully submit that our views in this respect are fully supported by the expression of opinion, above quoted, declared in the case of Johnson v. United States, 215 Fed. Rep. 684, *685*.

In another respect, the case of Johnson v. United States, 215 Fed. Rep. 684, *686,* is applicable.

It will be recalled that the prosecuting attorneys attempted to show, and actually put questions to the defendant Diggs on cross examination, that Diggs had in the course of the trial and in the presence of the jury, during the cross examination of Miss Warrington, repeat-

edly suggested to his counsel questions to be propounded to Miss Warrington. Objection and exception was taken to this line of conduct, and it was assigned as error and misconduct and the trial Judge was asked to instruct the jury to disregard the misconduct of the prosecuting attorneys, to which he replied: "I will instruct the jury at the proper time for instructing them." (Transcript of Record, pp. 355-357.) It is to be noted that the trial Court absolutely failed to instruct the jury at any time as requested by counsel for the defendant or when delivering his charge to the jury. In fact, he permitted the Government attorneys to argue to the jury: (Mr. Sullivan): "Counsel *for the defense, prompted by the defendant, put these questions to Marsha Warrington.*" (Transcript of Record, pp. 368-369.)

The Circuit Court of Appeals, in the Johnson case, in speaking on page 686 of Volume 215 of the Federal Reporter, of certain questions asked of the defendant Johnson on cross examination, used the following language, which we deem, on principle, applicable to the situation above referred to in the case at bar:

> "A cross-examiner, for the purpose of stand from his own admissions, may go showing the character of the party on the

into collateral matters, but he is bound by the answers he obtains. What becomes of the rule if the cross-examiner, after obtaining a direct answer, is permitted to persist in repeating insinuating questions with the obvious object of having his innuendoes taken in preference to the sworn answer? If this negro pugilist had admitted that he had 'beaten up' white women he might well have been characterized as a 'brute.' The last four questions, and many of the others, were of the most pernicious type.

These matters might not of themselves lead to a reversal. *They have been given to show the atmosphere of prejudice that pervades the record. They afford the setting in which must be viewed an erroneous admission of evidence.* One witness was called on rebuttal. He was asked:

'Q. State the conversation you had on Christmas Eve, 1910, with defendant respecting Etta.

'A. He asked me to go to the hospital with him to call upon her. He told me he had had a fight with her at Bob Mott's Cafe on State Street.'

The giving of this testimony was duly objected to. We find nothing in the record to justify the injection into the case of the collateral question whether defendant exercised his fighting abilities upon women.

When the situation thus improperly created is measured against the doubtfully sustainable prostitution counts, we are all convinced that defendant did not have a fair trial of that issue."

V.

As the other points discussed by Mr. Roche are fully discussed in our Opening Brief, we shall not discuss them here.

Respectfully submitted,

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